IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 4 ...

FREDERIC WAYNE ETCHEVERRY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ,
410 Douglas Building,
Los Angeles 12, California,
Attorney for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-8030

TOPICAL INDEX

Petition for a Writ of Certiorari 1

1. Opinion of the Court Below 2
2. Statutory Provision Sustaining Jurisdiction 2
3. Questions Presented and How Raised 2
4. Statutes and Regulations Involved 2
5. Statement of the Case 5
6. The Facts 3
7. Reasons for Granting the Writ 5

Point I. This Court Has Never Decided the Constitutionality of the Current Draft Law, 50 U.S.C.A. Appendix, Universal Military Training and Service Act, or of Any Peace-Time Draft Law and It Should 6

Point II. The Act Is a Law Respecting an Establishment of Religion, Gives Preference to Some Religions over Others and Deprives Appellant of His Liberty Offending the First, Fifth and Thirteenth Amendment 8

Introduction to Argument—

A. Historically Peace-Time Conscription Was Considered Unconstitutional 8

B. War Time Cases Are Not in Point 9

Argument—

A. The Act Is Unconstitutional and Void in All Its Parts 14

(1) The Fifth Amendment bars improper exercise of the War power 14

(2) Its terms are beyond the powers of Congress 16

(3) Its purpose is beyond the limited power of Congress 19

B. The Act Offends the First Amendment. The Provisions of the Act Effectively Operate As an Establishment of Religion, in Several Ways 23

(1) The Act gives total exemption, from any kind of service to ministers of religion 23

(2) Minority religions are to be protected by the courts; the Act, by its "Supreme Being" clause needlessly proscribes certain religions and constitutes a "law respecting an establishment of religion" in violation of the Constitution and the First Amendment 25

(3) Conscience is under constitutional protection 39

C. The Act Offends the Thirteenth Amendment 47

D. Peace Time Conscription Was Not Required by a Clear and Present Danger and Cannot Be So Justified at Present 48

(1) There was not even a declared emergency in the present Act 49

(2) A clear and present danger must be shown to uphold the Act 49

(a) The doctrine of clear and present danger 49

(b) Facts bearing on the application of the doctrine 54

8. Conclusion 57

Appendix A: Opinion of the United States Court of Appeals A1

Appendix B: Judgment of the United States Court of Appeals A3

Appendix C: Order Extending Time to File Petition for Writ of Certiorari A4

TABLE OF CASES

American Communications Assn. v. *Douds*, 339 U.S. 382, 399 (1950) 45
Arver v. *U. S.*, 245 U.S. 366, January 7, 1918 5, 6, 9, 10, 17
Atherton v. *United States*, 9 Cir., 1949, 176 F.2d 835 7
Berman v. *United States*, 156 F.2d 377 (9th Cir. 1946), cert. denied 329 U.S. 795 (1946) 44
Billings v. *United States*, 232 U.S. 261 17
Bridges v. *California*, 314 U.S. 252 50
Brooks v. *United States*, 1945, 147 F.2d 134, 134-135 47-48
Cannon v. *United States*, 181 F.2d 354 (9th Cir. 1950), cert. denied 340 U.S. 892 (1950) 46
Cantwell v. *Connecticut*, 310 U.S. 296; 1940 50, 54
Carter v. *Carter Coal Co.*, 298 U.S. 238, 291 22
Clark v. *United States*, 236 F.2d 13 (9th Cir. 1956), cert. denied 352 U.S. 882 (1956) 44, 46
Cummins v. *Missouri*, 4 Wall. 277 at page 325 14
Davidson v. *United States*, 218 F.2d 609 (9th Cir. 1954), cert. denied 350 U.S. 887 (1955) 44, 46
Davis v. *Beason*, 133 U.S. 333, 342 (1890) 42, 44
Estep v. *United States* 327 U.S. 114 26
Everson v. *Board of Educ.*, 330 U.S. 1, 35-38 (1947) (dissent) 42
Ex parte Milligan, 4 Wall. 2, 120-121 14
Frantz v. *United States*, 180 F.2d 711 (7th Cir. 1950), cert. denied 339 U.S. 962 (1950) 46
Gara v. *United States*, 178 F.2d 38 (6th Cir. 1949), aff'd 340 U.S. 857 (1950) 46
George v. *United States*, 196 F.2d 445 (9th Cir. 1952), cert. denied 344 U.S. 843 (1952) 42, 46
Girouard v. *United States*, 328 U.S. 61 (1946) 41, 42, 44
Hamilton v. *Bd. of Regents*, 293 U.S. 245, 255 S. Ct. 197 (1934) 10, 19, 24
Henderson v. *United States*, 7 Cir., 1950, 180 F.2d 711 et al. 6
Highland v. *Russell Car & Plow Co.*, 279 U.S. 253 at pages 261 and 262 15

Home Building and Loan Association v. Blaisdell, 290 U.S. 398 21, 22
Howze v. United States, 9 Cir., 1959, 272 F.2d 146 7
James v. Bowman, 190 U.S. 127 17
Kennedy v. Mendoza-Martinez, (February 18, 1963) 83 S. Ct. 554 21, 56
Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) 16
Martin v. Mott v. Mott, 12 Wheat. 33 17
McKenzie v. Hare, 239 U.S. 299, 308 17
Michener v. United States, 184 F.2d 712 (10th Cir. 1950) 42
Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893) 16
Mormon Church v. United States, 136 U.S. 1 (1890) 44
Near v. Minnesota, 283 U.S. 697, 720-21 (1931) 45
Olson v. United States, 292 U.S. 246 (1934) 16
Palmer v. United States, 223 F.2d 893 (3rd Cir. 1955), cert. denied 350 U.S. 873 (1955) 46
Reynolds v. United States, 98 U.S. 145, 164 (1878) 42, 44, 45
Richter v. United States, 9 Cir., 1950, 181 F.2d 591 6, 10, 42, 46
Schechter v. United States, 295 U.S. 495 (1934) 21, 22
Schneiderman v. United States, 320 U.S. 118 (1943) 41, 42
Taylor v. Mississippi, 319 U.S. 583 50, 54
The Selective Draft Law Cases, 245 U.S. 366 19
The Trademark Cases, 100 U.S. 82 17
Thomas v. Collins, 323 U.S. 516, 531 (1945) 42
Torcaso v. Watkins, 81 S. Ct. 1680 (1961) 26
Trop v. Dulles, 1958, 356 U.S. 96 22
Uffleman v. United States, 9 Cir., 1956, 230 F.2d 297 7
United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 275 (1943) 16
U. S. v. American Brewing Co., 296 Fed. 772, 776 27
United States v. Atherton, 176 F.2d 835 (9th Cir. 1949), cert. denied 338 U.S. 938 (1950) 47
United States v. Ballard, 322 U.S. 78, 86 (1944) 28, 45
United States v. Butler, 297 U.S. 1 22
United States v. Hoepker, 7 Cir., 1955, 223 F.2d 921 48

U. S. v. Ju Toy, 198 U.S. 253 17
United States v. *Kauten*, 133 F.2d 703 (2nd Cir. 1943) 44
United States v. *Kime*, 188 F.2d 677 (7th Cir. 1951), cert. denied 342 U.S. 823 (1952) 42, 46
United States v. *MacIntosh*, 283 U. S. 605, 622, 51 S. Ct. 570, 574 (1931) 10
United States v. *Miller*, 317 U.S. 369, 374 (1934) 16
United States v. *Nugent*, 346 U.S. 1, 12-13 (1953) 42
U. S. v. *Reese*, 92 U.S. 214 17
Virginia Coupon Cases, 114 U.S. 269 19
Warren v. *United States*, 338 U.S. 947 (1950) 45, 46
Washington Ethical Culture Society v. *District of Columbia*, 249 F.2d 127 24, 37
West Virginia Board of Education v. *Barnette*, 319 U.S. 624, 642 29, 41, 42, 50, 54

OTHER AUTHORITIES

Act of February 28, 1795 16
A. J. Nock, Jefferson, p. 304 32-33
50 App., U.S.C., § 462 (Universal Military Training and Service Act) 3
Barnes, History and Social Intelligence, p. 347 34
California Penal Code, § 2600 26
91 Congressional Record, May 31, 1945, Sen. Robert A. Taft 8, 15
Cornell, Exemption from the Draft 42
Cornell, The Conscientious Objector and the Law (1943) 42
Draft Act of March 3, 1863 16
Encyclopaedia of Religion and Ethics 183, Hastings 30
First, Fifth and Thirteenth Amendments 2, 8, 15, 28, 36
Freeman, A Remonstrance for Conscience, 106 U. of Pa. L. Rev. 806, 808-13, n. 3-32 (1958) 40, 45
Freeman, Civil Liberties and You, 10 Syracuse L. Rev. 1 (1958) 41, 45
2 Hastings, Encyclopaedia, 179 31
International Journal of Ethics, July, 1900, p. 425 32

J. E. Remsburg, Six Historic Americans, p. 66 32
Konvitz, Fundamental Liberties of a Free People, 209-16, 275-341 (1957) 40
Lin Yutang, p. 767 31
"Man Seeks The Divine," pp. 181, 185, 194, 209, Harper, 1958, Prof. E. E. Burtt 30-31
Messages and Papers of the Presidents, pp. 200, 245, 390 34-35
Natural Religion, p. 228, Max Muller 30
New Hampshire Historical Society, Daniel Webster, Dec. 9, 1814 8
Religion and Law, Aldine, 1962, Philip B. Kurland 12
Robert Cushman, Essays on Political Theory, Cornell Univ. Press, 1948 51
Sources and Limits of Religious Freedom-Summers, 41 Illinois Law Review, 53.67 50-51
62 Stat. 604, 50 U.S.C., App. 98, Sec. 6 (j) (Selective Service Act of 1948) 5, 6, 23, 25
The Holy Bible, Jeremiah 17:10 43
The Holy Bible, Phil. 2:12-13 37
The Holy Bible, Psalms 44:21 43
The Law As Literature, Louis Blum-Cooper, 1961, The Rodley Head, London 37
50 U.S.C.A. App., §§ 1(b), 6(g), 16(g) 30, 1(a), 465(c) (Universal Military Training and Service Act of 1951) 2-3, 49
United States Constitution, Art. I, Sec. 8, C. 12 ..... 2, 17, 19
United States Constitution, Art. I, Sec. 8, C. 15 16
United States Constitution, Art. I, Sec. 10 20
United States Constitution, Art. II, Sec. 2 20
United States Constitution, Art. VI, C. 3 ..... 2, 26, 44
28 U.S.C., Section 1254 (1) 2
18 U.S.C., § 3231 2
31 Virginia Law Review 40, p. 56, Harrop A. Freeman, Professor of Law, Cornell University 11, 53
Volume 11, Conscientious Objection, Selective Service System, 1950 56
Webster's International Dictionary 20, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No.

FREDERIC WAYNE ETCHEVERRY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages . It is also set forth as Appendix A to the petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1963 [R. ;* also see Appendix B to this petition]. This Petition for Writ of Certiorari is filed within the required thirty days' time, as extended by order of Mr. Justice White (Appendix C).

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The district court has jurisdiction under 18 U.S.C. § 3231.

3. QUESTION PRESENTED AND HOW RAISED

The sole question presented is does the act as construed and applied violate the First, Fifth and Thirteenth Amendments? This entire question was raised by written motions to dismiss the indictment and for judgment of acquittal [R. 4, 8].

4. STATUTES AND REGULATIONS INVOLVED

Involved are Articles I, (Sec. 8) and VI of the Constitution; the First, Fifth, Tenth and Thirteenth Amendments; The Universal Military Training and Service Act

*R. refers to the Transcript of Record.

of 1951, as amended (50 U.S.C.A. App.), §§ 1(b), 6(g), § 16 (g) 30, 1(a) and 465(c). They are set forth in Reasons for Granting Writ.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act, 50 App., U.S.C., § 462 [R. 2-3]; that he became a registrant of Local Board No. 95 of the Selective Service System in the County of Los Angeles, State of California and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 95 to report for induction into the armed services of the United States [R. 2-3].

Petitioner pleaded not guilty, waived jury trial and was tried on November 21, 1962 and November 28, 1962 [R. 10]. A written motion to dismiss indictment and a written motion for judgment of acquittal were filed [R. 4, 8]. The motions were denied and the petitioner was found guilty on November 28, 1962, and on the same day was sentenced and admitted to bail pending appeal in the sum of $1.00 [R. 10].

The motions contain all of the grounds that the appellant relies upon for reversal of the judgment in this case [R. 4, 8].

6. THE FACTS

Appellant registered with Local Board No. 95 on July 16, 1956 [Ex. 1-2].*

*Ex. refers to the Government's Exhibit, the selective service file of appellant. The pagination is ordinarily pencilled at the bottom of each sheet of the exhibit.

On July 8, 1957, he executed and filed the Classification Questionnaire (SSS Form No. 100), answering all questions that were applicable to him [Ex. 7-13].

On August 13, 1959, the local board classified him in Class I-A [Ex. 14].

On March 28, 1962, he asked for and was given the Special Form for Conscientious Objector (SSS Form No. 150) [Ex. 24]. He filled out and filed this form on April 11, 1962 [Ex. 25-28].

He answered all questions in the form, showing, among other things, he was a Quaker [Ex. 27] and expressing his views on the relation of his pacifist belief to a Supreme Being, as follows:

> "I believe in an anthropomorphic being who makes contact with all individuals by a vine like spiritual field which trys to take root. To kill another human is to cut off part of God." [Ex. 25].

He added several pages of typed additional explanation [Ex. 30-33] and of printed clippings [Ex. 35-39].

Petitioner, himself, unrepresented by counsel during his Selective Service System processing raised the constitutional question in a four page letter to his local board. (Pages 30-33 of the Selective Service System file, a government exhibit).

On May 8, 1962, the local board reclassified him again in Class I-A [Ex. 14] and on May 23, 1962, sent him an Order to Report for Induction [Ex. 42].

He did not report as ordered but again gave his viewpoint and whereabouts [Ex. 41, 53-54]; he was subsequently indicted and convicted as related in Statement of the Case.

7. REASONS FOR GRANTING WRIT

The sole question raised by this petitioner is the constitutionality of the current draft law.

It hardly needs statement that this law disrupts the normal career plans of our youth more than any other existing law, or any one that Congress conceivably would enact.

If peace-time conscription is unconstitutional, as petitioner contends, the question presented is without doubt of grave importance to a large portion of the public.

The relatively brief presentation herein will cover these two points:

I. This court has never decided the constitutionality of the current draft law, 50 U.S.C. Appendix, Universal Military Training and Service Act, or of any peace-time draft law and it should.

II. This Court's last decision on the constitutionality of a draft law was in the Selective Draft Cases (*Arver* v. *U. S.*, 245 U.S. 366, January 7, 1918).

Substantially different attacks on conscription are made by this petition.

Moreover, the Arver decision itself should be reconsidered for one or more of the several reasons advanced herein.

POINT I

This Court Has Never Decided the Constitutionality of the Current Draft Law, 50 U.S.C., Appendix, Universal Military Training and Service Act, or of Any Peace-Time Draft Law and It Should.

Many federal courts have decided constitutional questions raised under the various twentieth century draft laws but this Court has not, since January, 1918.

Arver v. *U. S.*, 245 U.S. 366, January 7, 1918, dealt with a "war-time" draft law and will be discussed in Point II.

The constitutional attacks on the recent draft laws arose generally from two groups: one attack was presented by "non-registrants," motivated variously. Although the 1917 non-registrant attacks were by socialist "political" objectors, all the subsequent attacks have been by religiously motivated non-registrants. The pacifist term them "absolutists" for their objections to participation in conscription have led them to the extreme position of refusing even to register for the draft.

It has been uniformly held that none of the non-registrants had standing to challenge the draft law. Unlike the disposition of the attack presented by the Selective Draft cases *supra* (Arver) the more recent non-registrants have been explicitly informed by the appellate courts of their lack of standing. See *Richter* v. *United States*, 9 Cir., 1950, 181 F.2d 591, *Henderson* v. *United States*, 7 Cir., 1950, 180 F.2d 711 *et al.*. All of these were consistently precluded from challenging the substantive provisions of the law. This Honorable Court too, refused to hear any of these cases: Richter, Henderson, *et al.*, being denied certiorari.

We believe there is no need to argue this phase of the situation further. Petitioner Etcheverry having registered and having had his claim for a conscientious objector classification rejected is in a position to urge what Richter, Henderson and the dozens of others like these could not.

The other class of constitutional attacks involved registrants with standing, but were limited to attacks concerning civilian work situations. They can be subdivided into two general groups, a timewise grouping being appropriate: the WWII cases and the post-Korea cases.

The former generally arose from Civilian Public Service Camp "walkout" situations. Such appellants, as in *Atherton* v. *United States*, 9 Cir., 1949, 176 F.2d 835 had (1) been classified administratively in Class IV-E (now termed I-O) and (2) were sent to a C.P.S. camp and (3) became "walkouts" for a variety of reasons, but always ideological

The post-Korea constitutional attacks by civilian work assignees were generally made by a type of religious objector somewhat differently situated and motivated: Jehovah's witnesses. The witnesses object to assigned work as a compromise with their commitment to be a minister of Jehovah. Such attacks, as in *Howze* v. *United States*, 9 Cir., 1959, 272 F.2d 146, occasionally arose after a refusal to remain in assigned employment although more often, like in *Uffleman* v. *United States*, 9 Cir., 1956, 230 F.2d 297, after a failure to accept assigned employment.

In all these cases the draftee had been classified as a conscientious objector; he was not challenging the legality of his classification. None posed the problem of establishment of religion as this petitioner does.

We conclude, therefore, from this quick survey of past constitutional attacks on the draft laws that this peti-

tioner is in a distinguishably different position to present his attack and is relatively unhampered by adverse precedent.

We next argue the Act is a law respecting an establishment of religion, gives preference to some religions over others and deprives appellant of his liberty offending the First, Fifth and Thirteenth Amendments.

POINT II

The Act Is a Law Respecting an Establishment of Religion, Gives Preference to Some Religions over Others and Deprives Appellant of His Liberty Offending the First, Fifth and Thirteenth Amendment.

Introduction:

A. Historically, peace-time conscription was considered unconstitutional.

The views of two great Americans (spanning our national existence) are presented as an introduction to our argument.

(1) Robert A. Taft addressed the Senate on this subject. His speech is in 91 Congressional Record, May 31, 1945. Since the petitioner himself quoted it at length during his allocution and it is in the Reporter's Transcript, pages 7-9, we believe we need say here only that the Senator was unequivocally against peace-time conscription as unconstitutional.

(2) Daniel Webster addressed the House on this subject, on December 9, 1814. His speech, in his own handwriting is now lodged in the New Hampshire Historical Society.

Mr. Webster said: "Mr. Chairman: After the best reflection which I have been able to bestow on the sub-

ject of the bill before you, I am of opinion that its principles are not warranted by any provision of the Constitution."

And in his further discussion of the bill he said:

> "To this end it commences with a classification which is no way connected with the general organization of the militia, nor, to my apprehension, included within any of the powers which Congress possesses over them. All the authority which this Government has over the militia, until actually called into its service, is to enact laws for their organization and discipline. This power it has exercised. It now possesses the further power of calling into its service any portion of the militia of the States, in the particular exigencies for which the Constitution provides, and of governing them during the continuance of such service. Here its authority ceases. The classification of the whole body of the militia, according to the provisions of this bill, is not a measure which respects either their general organization or their discipline. It is a distinct system, introduced for new purposes, and not connected with any power which the Constitution has conferred on Congress."

B. The war-time cases are not in point.

The leading, modern war-time case is *Arver* v. *United States*, 245 U.S. 366 (January 7, 1918), often referred to as the Selective Draft Cases.

Arver has been cited by nearly all post-1918 decisions. To the degree that Arver is either not in point, or has inherent weakness (as we will argue) the decisions that do little more than cite Arver are likewise weak or not applicable to our situation.

Arver is subject to the following criticism and distinguishing features:

First, it is a war-time decision and can hardly be authority to sustain a peace-time draft law. This Court has been careful in some cases to caution that its words upholding the broadest military powers in war-time, should not be extended to peace-time. *Hamilton* v. *Bd. of Regents*, 293 U.S. 245, 255 S. Ct. 197 (1934): "There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace." *United States* v. *Macintosh*, 283 U.S. 605, 622, 51 S. Ct. 570, 574 (1931): "other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war."

Next, we take the position that the 1918 Arver decision was obiter. Our reasoning is as follows: it is well established that one cannot complain to a court of a law that doesn't affect him. In *Richter* v. *United States*, 9 Cir., 1950, 181 F.2d 591, it was explicitly pointed out that Richter a non-registrant, could not complain of the alleged unconstitutionality of substantive provisions of the law, saying:

> "[5] Appellant, in addition to the foregoing contentions, challenges the constitutional validity of the exemption and conscription provisions of the Selective Service Act. The registration provisions, which he violated, are, however, separable from the other provisions of the statute, and until compliance with the registration requirements; at least, he has no standing to attack the other sections to which he has not as yet made himself subject, and to which he might never be subject. Title 50, U.S.C.A., Appendix, § 465(a). United States v. Sugar et al., D. C., 243 Fed. 423; Stone v. Christensen et al., supra; United States v. Rapeport, supra." [594].

A study of the records in the 1918 Selective Draft Law Cases, *Arver* v. *United States*, 245 U.S. 366, 38 S. Ct. 159, decided January 7, 1918, shows that the plaintiffs in error

in those cases had no more standing to contest the 1917 law's constitutionality than Richter did the 1948 law. The decision of the Supreme Court does not reveal this lack of standing but the briefs clearly show it. Plaintiffs-in-error Arver, Grahl, Wangerin, Kramer and Graubert were each indicted on one count only for failure to register.

Since petitioner Etcheverry *did* register we contend not only that he can make his present attack but make it free from any harm to his contention by the Arver decision.

To conclude our argument on standing: it is our view that this Court ignored the problem of standing because it believed the importance of resolving all constitutional doubts was imperative.

Since Arver is the basis (as we have already stated) for nearly all subsequent decisions on this subject a somewhat more detailed analysis of the weaknesses of Arver other than as dictum is presented:

Although this Court devoted many pages to its consideration of the issues presented the Court's manner of consideration has evoked much adverse comment. For example, Harrop A. Freeman, Professor of Law at Cornell University writing in 31 Virginia Law Review 40, at page 56 says:

> "There are some who find in the court's opinion the attitude which Shakespeare made famous in the words: 'The lady doth protest too much, methinks.' For the court's argument is constantly advanced by this type of wording: 'cannot conceive', 'too frivolous for further notice', 'so devoid of foundation', 'not even a shadow of ground', 'to do more than state the proposition is absolutely unnecessary', 'unnecessary to follow', 'wholly unnecessary to explore', 'cannot be the

slightest doubt', 'it is indisputable', 'fallacy of the argument', etc."

Another writer, Philip B. Kurland, in Religion and the Law, Aldine, 1962, treats the Court's consideration of the First Amendment problem in Arver, as follows:

> "Mr. Justice White's opinion for a unanimous Court, rendered during the height of the American participation in World War I, disposed of the issue quickly, but without authority or reason. 'And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.'[90] The decision is as sound as the reasons given for it." [37-38].

Next, it is to be noticed that the Act considered by Arver was not like our current conscription law. It was a temporary war-time measure, the report of the opinion itself commencing: "Mr. Chief Justice White delivered the opinion of the Court.

> "We are here concerned with some of the provisions of the Act of May 18, 1917 (Public No. 12, 65th Congress, c. 15, 40 Stat. 76), entitled 'An act to authorize the President to increase temporarily the military establishment of the United States.' The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant." [160].

Finally, we believe it justifiable to state that the reasoning and illustrations used by the Court in Arver were not always fair. At one point an argument was dealt with as follows:

"To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force." [161] (The footnote follows)

"1. In the argument of the government it is stated: 'The Stateman's yearbook for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Columbia, p. 790; Chili, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1191; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353.' See also the recent Canadian conscription act, entitled, 'Military Service Act' of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September 20, 1917, 55th Cong. Rec. p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Com.. ndo Law, sections 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic, 'De Locale Wetten en Volksraadsbesluiten der Zuid Afr. Republick' 1898, Law No. 20, pp. 230, 233, Article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59; Dodd, 1 Modern Constitutions, p. 314; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur de Recrutement de l'armee of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133)."

This is a patently unfair argument for the unquestioned widespread use of conscription in 1917 was not a

fact of life or of history in 1787 when Article VI of the Constitution (the immediate subject being discussed by the Court on page 161) was adopted. Conscription came into modern history with Napoleon.

It is to be seen from the above scrutiny of the Arver decision that it was (1) intended to be applicable to a war-time law, (2) suffers from the infirmity of being obiter and (3) it rests in substantial part, at least, on a questionable rationale.

We conclude, therefore, that the war-time cases upholding the constitutionality of conscription are inapplicable to our situation.

ARGUMENT

A. The Act is unconstitutional and void in all its parts.

(1) The Fifth Amendment bars improper exercise of the war power.

This Court as early as *Ex Parte Milligan*, 4 Wall. 2, 120-121, held that the Fifth Amendment is a valid bar against the improper exercise of the war power. The Milligan case involved the release on habeas corpus of a civilian who had been sentenced to death upon a military trial during the Civil War in the State of Indiana, where federal court trial was available. Compare *Cummings v. Missouri*, 4 Wall. 277 at page 325.

While some of the cases dealing with the exercise of the war power speak of the presumption of regularity attaching to presidential and other official acts, nevertheless, this Court itself has recognized that such presumption will be of no avail where a presidential war order is clearly shown to be arbitrary and repugnant to the Federal Con-

stitution. See *Highland* v. *Russell Car & Plow Co.*, 279 U.S. 253, at pages 261 and 262.

Petitioner has been deprived of his rights contrary to the due process clause of the Fifth Amendment to the Constitution.

Petitioner contends that the government tried to seize his labor, that is, conscript him. Certainly a man's labor is his property; to most men it is their most important property—that which they trade for the necessities of life. A man's labor energy and freedom should certainly be afforded the same protection of the Fifth Amendment as is any other property.

Additionally, freedom is more important to an individual than his property. It was at the insistence of Thomas Jefferson that, "life, liberty, and the protection of property . . ." from the Magna Carta was changed to read, "life, liberty, and the pursuit of happiness. . ."

As Senator Robert A. Taft put it:

> "If we admit that in peace time we can deprive a man of all liberty and freedom of action, if we can take him from his family and his home, then we can do the same with labor, we can order the farmer to produce and we can take over any business. If we can draft men, it is difficult to find an argument against drafting capital. Those who enthusiastically orate of returning to free enterprise and at the same time advocate peace time conscription are blind to the implications of this policy. They are utterly inconsistent in their position. Because of its psychological effect on every citizen, because it is the most extreme form of compulsion, military conscription will be more the test of our whole philosophy than any other policy." (91 Cong. Record, May 31, 1945)

Although the government pays wages to conscripts during training it cannot be contended that this is "going rate" compensation. *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 326 (1893). Labor has a determinable market value and that value is the standard of compensation. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 275 (1943). The fact that the government resorts to compulsion shows that the market value is not being paid since market value is in the words of the court, *United States* v. *Miller*, 317 U.S. 369, 374 (1934), "What a willing buyer would pay in cash to a willing seller." *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), *Olson* v. *United States*, 292 U.S. 246 (1934).

(2) Its terms are beyond the powers of Congress.

The power of Congress over the general manpower ("militia") is limited to three purposes "to execute the laws of the union, suppress insurrection and repel invasions." Constitution, Art. I, Sec. 8, C. 15.

Early Congressional Drafts were manifestly within these terms. Compare—

(a) Act of February 28, 1795:

> "That whenever the United States shall be invaded or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia," etc.

(b) Draft Act of March 3, 1863:

> "Whereas there now exists in the United States an insurrection and rebellion against the authority thereof, and it is, under the Constitution of the United States, the duty of the Government to suppress insurrection and rebellion," etc.

In *Martin V. Mott* v. *Mott*, 12 Wheat. 33, it was held the act of February 28, 1795, was valid, on the ground that act authorized the President, in cases of invasion, etc., to call forth the militia. And the same is the major rationale of the Civil War cases.

This Court has held that when the terms of a statute are so broad as to extend beyond the power of Congress, the courts are not at liberty to introduce words of limitation to bring it within that power. See—

McKenzie v. *Hare*, 239 U.S. 299, 308.
The Trademark Cases, 100 U.S. 82.
James v. *Bowman*, 190 U.S. 127.
U. S. v. *Reese*, 92 U.S. 214.
U. S. v. *Ju Toy*, 198 U.S. 253.

If it be urged that Congress derives its power herein not from the clause above recited but from Article I, Section 8, Clause 12: "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years" we reply that the Supreme Court has never passed on this question concerning a peace-time Act, only on the war-time Act, in *Arver, supra*. Further, it is a first principle of constitutional law that all parts of the constitution must be harmonized and one part cannot wipe out another: *Billings* v. *United States*, 232 U.S. 261.

Therefore, a general theory of the relation of the 12th and 15th clauses of Section 8 must be found (if there be any conflict a latter clause must control a former); this proposition needs no citation of authority.

It is unbelievable that the framers of the Constitution, who so jealously guarded and limited the Federal Government's power to call forth the militia, lest it strip from the State and the people that which their race-history had

taught them to cherish as the shield of their liberties against despots, meant at the same time to leave an implied power whereby Congress might accomplish that very thing.

The purpose of the framers of the Constitution was to guard against encroachments by the central authority upon the liberties of the people. They feared a big army under its control. That fear shows itself in many clauses. They limited "appropriations of money to that use" to two years. They reserved "to the States respectively the appointment of the officers and the authority of training the militia." They declared "a well-regulated militia" to be "necessary to the security of a free State," and forbade infringement of "the right of the people to keep and to bear arms." These elaborate precautions for guarding the front door against encroachments of the Federal power are rendered ridiculous if the Federal Government may enter by the back door and possess itself of the militia in the guise of "raise and support an army."

The militia was a State institution before any Federal Government was created. Every state constitution provided for it. Every State has the undoubted power to draft all male citizens as a part of its militia. There is no evidence of any intention to relinquish any of this State power to the Federal Government. On this, as other subjects, all powers not delegated were reserved (Amendment X).

This strengthens the construction already suggested that in time of actual war or emergency one is "raising an army"—a unit to be used in fighting. In peace time *training* of manpower we are dealing with a "militia". Under the peace time draft men are not made components of an army; some take only six months away-from-home training and then weekly training at home. This is a

further reason why the "training act" (it is so entitled) is unconstitutional.

(3) Its purpose is beyond the limited power of Congress.

Its main design is merely to train men. If that is beyond Congress' power then its punitive provision is also void, being only auxiliary. *Virginia Coupon Cases*, 114 U.S. 269.

Before making a closer study of the Act we emphasize our thought by a bit of repetition: Although this Court has upheld wartime conscription in Arver (*The Selective Draft Law Cases*, 245 U S. 366), it has never upheld a peacetime draft act, much less a peacetime Act like the present. In fact the Court (as distinguished from some lower courts) has been extremely cautious not to give its opinions on peacetime compulsory service. As the Court said in *Hamilton v. Board of Regents*, (293 U.S. 245):

> "There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace."

It is our belief that the only constitutional provision important to our immediate concern is the following:

Art. I, Sec. 8, "The Congress shall have power * * *

"To declare war * * *

"To raise and support Armies, but no Appropriation of Money to that use shall be for longer term than two years;

"To provide and maintain a navy;

"To make Rules for the Government and Regulation of Land and naval Forces;

"To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrection and repel Invasions;

"To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the Authority to train the Militia according to the discipline prescribed by Congress; * * *

"To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *"

Art. I, Sec. 10. "No state shall, without the consent of Congress * * * keep troops or ships of war in time of peace."

Art. II, Sec. 2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States * * *."

It will be seen that five types of military organizations are referred to: "Troops", "armies", "forces", "navy" and "Militia". The provisions may be summarized and relation of the federal and state governments seen if we paraphrase the Constitution thus: The federal government may raise and maintain armies and navies and govern its forces; the states may not keep troops or war ships; able-bodied men are members of State militias—that is training groups not in active service; the federal government has no militia of its own (*i. e.*, no power to train the general manpower as compared to the power to train armies); the federal government may, by conscription if it chooses, take the members of the State militias into the federal army.

All these distinctions are inherent in the words used in the Constitution (as defined by Webster's International Dictionary):

Troops—Soldiers, collectively; an armed force.

Army—An armed expedition.

Forces—Strength or power for war, whether offensive or defensive * * * hence any body of soldiers, sailors or marines.

Navy—A fleet of ships; an assemblage of vessels * * * the war vessels belonging to a nation, considered collectively.

Militia—A body of citizens enrolled as a regular military force for periodical instruction, discipline, and drill, but not called into active service except in emergencies.

It is crystal clear that the only general manpower (militia) referred to in the Constitution belongs to the states. There is no similar power in the federal government. The only draft law ever approved by the Supreme Court was a wartime draft which put the men into the federal Army—that is into "an armed expedition" and could be and was therefore sustained as an exercise of the federal power "to raise and support armies". Even the 1940 draft act, though adopted when we were technically at peace, drafted men into an army—not into a training program from which they were released at the end of a short period.

So well established are two rules of construction that mere mention need be made: (1) neither war nor any other emergency abolishes constitutional provisions or creates powers not conferred on the federal government by the constitution [*Ex parte Quirin*, 317 U.S. 1 (1942); *Schechter v. United States*, 295 U.S. 495, 528 (1934); *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398; *Kennedy v. Mendoza-Martinez*, (February 18, 1963), 83 S. Ct. 554 and many other cases], and (2) the federal government is one of delegated, rather than inherent, powers and can-

not exercise a power not clearly given it by the Constitution. (*United States* v. *Butler*, 297 U.S.1; *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291; *Schechter* v. *United States supra*; *Bldg. & L. Ass'n* v. *Blaisdell*, *supra*.)

No one has ever proved that the Constitution gives the federal government a "militia" power (to train the general manpower). The most that has been suggested is that the organized militia of the states (troops—National Guard) have been made by Congress, a part of the United States army; that Congress has considered that there is a United States (reserve) militia; that one Supreme Court case in upholding a state militia law has said that this militia constitutes the "reserve militia of the United States as well as of the states." It is one thing for Congress to record that it considers the state militias a reserve for its own use;—for that is intended by the constitution giving the federal government the power to call out the state militia. It is quite another thing for Congress to claim a power which the Constitution does not give it—to train in peacetime the general of selected manpower.

Even if the Act can be construed as authorizing the placement of the inductees in the "army", the actual method of operation shows that it is not an exercise of the "army" power but rather an attempt to create and train a federal "militia" in violation of the constitution.

As in *Trop* v. *Dulles*, 1958, 356 U.S. 96, we are dealing with a penal provision [99]. In Trop the Court held the statute involved unconstitutional because the section involved was not based on any "[R]ational nexus . . . between the content of a specific power in Congress and the action of Congress in carrying that power into execution" [ ].

B. The Act offends the First Amendment. The provisions of the Act effectively operate as an establishment of religion, in several ways.

(1) The Act gives total exemption, from any kind of service to ministers of religion.

Section 6 (g) of the Act provides:

> (g) Ministers of religion.—Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title.

Section 16 (g) of the Act defines the expression "minister."

> (g) (1) The term "duly ordained minister of religion" means a person who has been ordained in accordance with the ceremonial ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
>
> (2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a

religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly-ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship, as embodied in the creed of principles of his church, sect, or organization.

It is evident that religious groups who do not have "ministers" or other individuals that meet the statutory definition (appellant's group, the Quakers among others) are discriminated against. A number of groups, also, have men termed "leaders" (the Church of God, the Ethical Culture Societies among others*) and, by reason of the fact they each devote only a fraction of their time to ministry work (and that largely administrative) none of the "leaders" meet the standards of this particular statute. Are all religious groups to be required to choose between conforming or being left leaderless? Are the "orthodox" religions to be favored and the unorthodox deprived of their leadership? To ask this is to show the manifest fact: the draft law provides for an establishment of religion.

Professor Kurland of the University of Chicago, in his aforementioned recent book, after discussing *Hamilton* (*supra*) and other cases concludes:

* See *Washington Ethical Culture Society* v. *District of Columbia*, 249 F 2d 127.

"Were it not for the Selective Draft Act cases [*Arver, supra*] it should be clear that exemption from military obligations in terms of religious affiliation is unconstitutional. If military service be considered a duty of every qualified citizen, exemption grants a benefit to religious adherents because they are religious adherents, a result banned by the separation clause. There should be little doubt, for example, that the Government could not refuse commissions in the military service to all members of specified religious sects. It can no more grant benefits on that ground than it can deny them, unless the wall of separation is again to be breached. Cardozo's reference to Davis v. Beason [11] suggested that the high wall was to be maintained." [40-41].

(2) Minority religions are to be protected by the courts: the Act, by its "Supreme Being" clause needlessly proscribes certain religions and constitutes a "law respecting an establishment of religion" in violation of the Constitution and the First Amendment.

The 1948 draft law (and the current amendment) contains an innovation. The so-called "Supreme Being" clause is not found in the 1940 or 1917 draft laws.

THE STATUTE INVOLVED.

Section 6 (j) of the Selective Service Act of 1948, as amended (62 Stat. 604, 50 U.S.C., App. 98), also known now as the Universal Military Training and Service Act, as amended in 1951, 65 Stat. 75, 50 U.S.C.A., Appendix):

"Nothing contained in this title [this appendix] shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a

relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical view or a merely personal moral code."

We assert, first, that the Supreme Being clause of the draft law offends the VIth Article (3rd Clause) of the Constitution.

". . .: but no religious test shall ever be required as a qualification to any office or public trust under the United States."

This point was also raised recently in *Torcaso v. Watkins*, 81 S. Ct. 1680 (1961) but was not passed on "Because we are reversing the judgment on other grounds. . . ." (n. 1, p. 1680). Torcaso had been refused a notary commission because he refused to declare his belief in the existence of God.

It is a matter of common knowledge to all who have dealt with conscientious objectors that they prefer prison to surrendering their scruples, thereby becoming felons and ineligible for public office.

Estep v. United States, 327 U.S. 114.

In California and in most, if not all the states, a man convicted of a felony cannot hold public office.

California Penal Code, § 2600.

A test, based on religion, that a portion of the population cannot meet, is a test proscribed by the VIth Amendment. Here the test in effect condemns such a person to a felon's disabilities.

The Supreme Being clause accomplishes indirectly what is prohibited to be done directly.

Its eventual effect is to effectively prevent all conscientious objector males who do not believe in a Supreme Being from qualifying for public office.

In *U. S. v. American Brewing Co.*, 296 Fed. 772, 776, the opinion reads:

> "Surely no one would so construe Article VI that the prohibition of a religious test applied only to officers named by the President, or the head of a department. . . ."

While the current loyalty oaths make some parts of this decision obsolete the principle remains true.

The record here is clear that Etcheverry is a Quaker, is religiously motivated, and asked for exemption from military service because of religious training and belief. The government defended the denial of such exemption because the law defined what beliefs qualified and that Etcheverry's beliefs were not the kind within the law (Rep. Tr. 45).

> The Court: Just tell me what would justify the Board in disregarding it. He made a claim for that exemption.
>
> Mr. Nissen: In my opinion it is in response to question 2 on the front page of that form. They say, "Describe the nature of your belief . . . in a Supreme Being . . ." and he said, "I believe in an anthropomorphic being who makes contact with all individuals by a vine-like spiritual field which tries to take root. To kill another human is to cut off part of God.
>
> In other words, God in an anthropomorphic state, I suppose—being in the form of man, in other words.
>
> The Court: That would be a Supreme Being, wouldn't it?
>
> Mr. Nissen: Well, I suppose it can be thought of in that fashion. But it looks to me like the Board felt this is not the type of feeling on Supreme Being they associate with a conscientious objector.

We will devote only a relatively short time (considering its gravity) to our point for it may be that the govern-

ment will concede this. Our point is that, if the Act is construed as proscribing certain religious beliefs or defining religious orthodoxy, it is a violation of the First Amendment.

In this argument we are not discussing the point as to whether, in the draft law, Congress was required to exempt conscientious objectors from the operation of the law, or whether the requirement of "religious" belief is constitutional. We are discussing the fact that Congress did exempt conscientious objectors who, by reason of religious training and belief, are conscientiously opposed to war in any form and then went on, contrary to the prohibition of the First Amendment, to (a) include as religious only those believing in a Supreme Being and (b) to exclude from the meaning of "religion" a particular type of belief, namely, a religious belief based on political, sociological, philosophical, or moral tenets as distinguished from a belief in a Supreme Being. By so circumscribing what religion shall mean Congress did the very thing which the prohibition of the First Amendment sought to prevent. It made "a law respecting an establishment of religion." And if Congress didn't intend this the fact remains that it has been so construed [and or misused] by the Selective Service System. Had Congress merely stated that conscientious objectors, who by reason of religious training and belief were conscientiously opposed to war in any form, were to be exempt, a totally different problem would be involved. But Congress did not do this; it set forth its own meaning as to what religion is. This it had no power to do.

This principle of constitutional law is clearly set forth by the Supreme Court in *United States* v. *Ballard*, 322 U.S. 78, 86:

"The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. Board of Education v. Barnett, 319 U.S. 624. It embraces the right to maintain theories of life and death and of the hearafter which are rank heresy to followers of the orthodox faiths Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. . . . The fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence and disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. . . . The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."

Clearly the Congress did the very thing that was forbidden to it. Indeed, Congress seems to recognize that political, sociological, or philosophical views or a personal moral code may be a religion but it specifically prohibited that kind of religion from protection. This it cannot do

As was said in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."

Congress, therefore, by attempting to set up an orthodoxy in religion has exceeded the salutary restraining bounds of the First Amendment for to allow Congress to define or limit religion in any particular act or measure

is an opening wedge to permit Congress to define in greater detail and on subsequent occasions the nature of religion and its practice.

Next, we argue that one may have religious belief even though he does not believe in a Supreme Being, and bases his belief on philosophical or moral tenets.

The history of religions and the writings of scholars in the field quickly permit us to list religions claiming over half the people of the world as denying a Supreme Being or grounding belief on philosophical-moral tenets.

Thus the eminent scholar, Max Müller, has said:

> ". . . if an historical study of religion had taught us . . . one lesson only, that those who do not believe in our God are not therefore to be called Atheists, it would have done some real good, and extinguished the fires of many auto de fé." Natural Religion, p. 228

Most of the admittedly great religions of the world claiming many millions of followers deny the existence of a Supreme Being. Thus in Hastings, Encyclopaedia of Religion and Ethics 183, Buddhism is said to be "radically adverse to the idea of a Supreme Being—of a God, in the Western sense of the word." And the same work at page 185 quotes extensively from Hindu literature to demonstrate that the Sankhya School of that religion positively denies this existence of God. Confucianism substitutes the concept of "Heaven" or "Sky" for God and makes its tenet "li" or the doctrine of philosophical-moral order. Lin Yutang, in his Wisdom of China and India points out "Among the Chinese scholars, Confucianism is known as the religion of moral order, (p. 811)." Typical Confucian sayings are: "Heaven sees as my people see Heaven hears as my people hear," (to which Prof. E. A. Burtt, himself a Quaker *and* Buddhist, says "The general philosophical

implication is that the mind of the common man is the ultimate court," p. 181 of *Man Seeks The Divine*, Harper, 1958), and "They who accord with Heaven are preserved; they who rebel against Heaven perish" (Lin Yutang, p. 767). Taoism, the other great Chinese religion, has no concept of deity; it is "a philosophical religion, centered in the deep wisdom of Lao Tse and Chuang Tse." The central concept is "tao" or "The way"; myriad things arise out of the "tao"; they separate themselves by aggression; only as they "return to the Tao" does man "gain light, love, peace, and immortality"; such is the central teaching of this profound little book (E. S. Burtt, pp. 185, 194). Even Hinduism, though it has "duties" lacks A Divine Being instead (again as Prof. Burtt indicates, p. 209): "First and foremost is the concept of Brhman, the *metaphysical* absolute. Out of Brhman come all things; to Brhman all things return. In himself Brhman is unknown and unknowable." So the record could be extended almost indefinitely.

History is replete with the stories of non-conformists who were called atheists because they did not believe according to the current mode. Outstanding, of course, are the early Christmas who, pious and moral though they were, were called atheists because they did not believe as did the Greeks or Jews. (Parenthetically we may note that they too were often punished by the Romans for refusing military service.)

> "Comte's religious conception appears to be atheistic, insofar as it rejects the view that nature and humanity are the products of a self-existent and self-conscious Eternal Cause." (2 Hastings, Encyclopaedia, 179).

Auguste Comte, it will be recalled, is considered to be the founder of modern sociology. Yet Hastings naturally assumes Comte's view to be a "religious conception".

Speaking of Comte's followers, the Positivists, Dr. Stanley Coit, founder of the English "Ethical Culture" societies thus treats of their ideal of God:

> "So far as I am aware, the Positivists have never declared that Humanity is God. But they have maintained that all the homage and obedience which had been rendered to God should now be transferred to Humanity. They have worshipped Humanity, they have prayed to it, they have found strength and consolation in communion with it. Surely, then, it has become their God." (International Journal of Ethics, July, 1900, p. 425).

The lack of a positive assertion as to the existence of God is prominent in the religious teachings of the Unitarians and Universalists today. And prominent members of our society from whom we have derived considerable of our heritage have been among those of similar inclination.

Thus, Jefferson, in writing to his nephew at school, said:

> "Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a God; because, if there be one, he must more approve the homage of reason than of blindfolded fear. . . . Do not be frightened from this inquiry from any fear of its consequences. If it end in a belief that there is no God, you will find incitements to virtue in the comfort and pleasantness you feel in its exercise and in the love of others which it will procure for you."
>
> (J. E. Remsbury, Six Historic Americans (p. 66).)

And on another occasion he said:

> "Why have Christians been distinguished above all people who have ever lived, for persecutions? Is it

because it is the genius of their religion? No, its genius is the reverse. It is refusing toleration to those of a different opinion. . . ." (A J. Nock, Jefferson, p. 304).

Congress has placed the stamp of orthodoxy in a field where none exists. The Constitution embodied a toleration for all religions and not for some. Many scholars have defined religion in terms other than a belief in the existence of God, for example:

1. Hoffding: Religion is belief in the conservation of value.
2. Marshall: The restraint of individualistic impulses to universal human impulses.
3. Kropotkin: A passionate desire for working out a better form of society.
4. E. S. Ames: The consciousness of higher social values.
5. Elwood: Participation in ideal values of the social life.
6. E. A. Ross: The conviction of an idea bond between the members of society.
7. Matthew Arnold: Religion is morality touched with emotion.
8. G. B. Foster: The conviction that the cosmos is idea-achieving.
9. G. W. Knox: Man's highest response to what he considers highest.
10. G. A. Coe: Living the good life.
11. J. R. Seely: Any habitual and permanent admiration.

12. Bonsanquet: Loyalty and devotion toward values which are beyond the immediate self.

Indeed, many of the founding fathers would have failed to qualify as "religious" if the present act were applied in relation to them.

The Albany Daily Advertiser in 1831, published a sermon by Reverend Dr. Wilson in which the assertion was made that most of the founders of our country were "infidels" and that of the first seven presidents not one of them had professed his belief in Christianity. (Barnes, History and Social Intelligence, p. 347.)

Dr. Barnes remarked:

> "The late Mr. (Theodore) Roosevelt, in one of his more facetious and gracious moments, referred to Thomas Paine, who had rendered most notable services in promoting the independence and formation of our country, as a 'dirty little atheist.' By the same criteria most of the Fathers, certainly Franklin, Washington, Adams, Jefferson, Madison, Marshall, Morris and Monroe, were likewise 'dirty little atheists' as they all shared the religious belief of Paine and most other intellectuals of the time, namely either Unitarianism or Deism." (Ibid.).

Having a lively appreciation of the evils of bigotry in religion, the authors of the Constitution took care to prevent any popular effort to secure religious conformity by law. In 1796 an attempt to insert a "Christian" amendment in the Constitution was defeated. A speaker for the amendment referred to Washington's "Atheistic proclivities", censuring his admiration for the works of Thomas Paine. Washington, as we know, during his second administration assured the Moslems of Tripoli, through his diplomatic representative, that "The government of the United States is not in any sense founded on the Christian

religion"—a view later approved by John Adams, who sent the treaty containing this statement to the Senate, and by Jefferson, under whose administration the treaty containing the very quoted words, was ratified. (Messages and Papers of the Presidents, pp. 200, 245, 390).

During the campaign for the presidency in 1800, Jefferson was widely attacked as a free-thinker. He was accused of disbelief in the conventional religion of his time, and so fearful were the orthodox of his infidel opinions that two pious ladies of New England, when they heard he was elected, buried their Bibles in the garden lest the terrible Jefferson send officers to confiscate the Holy Scriptures.

It can hardly be urged that any "popular" meaning of religion was intended by the authors of the Constitution, to be used in determining whether a man is religious or not. Rather, if there be a criterion at all of the quality of being "religious", it must be sought in some other quarter than prevailing customs and inherited belief.

It has been shown, that from the earliest days of the Republic, numerous individuals, many of them illustrious figures in American history, obtained their moral and religious ideas from private study and reflection, and the quality of their religion became manifest in their lives. Countless men of today similarly derive their religious inspiration from unorthodox faiths; indeed, it is often claimed as one of the glories of American achievement that in the United States such men are free to practice their own individual religion. Shall we now circumscribe this freedom with limiting definitions founded on the dogmas of prevailing orthodoxy? Shall we jettison the right of an individual citizen to define his own religion and to practice it, when it is not the character of the practice which is in dispute—the law provides for religiously inspired con-

scientious objection—but simply the doctrinal authenticity of his profession of religion?

It is not here maintained that the question of whether a man is religious or not can be simply determined. Fortunately, this problem is seldom presented to the Courts. But when such questions do arise, it is absolutely necessary, we submit, that the greatest of care be taken to protect that most crucial of the Four Freedoms—freedom of religion. A man's religion is his life. It is valued above life by the truly religious man. And the quality of a man's religion is best determined by reference to the quality of his actions and the consistency of his resolves.

Accordingly, the Act by defining out certain admittedly good, moral and ethical beliefs as not "religions" though, it has been shown, they have every earmark which goes to make religion and are world recognized as religions, violates appellant's right to protection under the First Amendment.

The Supreme Being clause in the new draft law places Congress' imprimatur on what religion is.

At least five religious groups are discriminated against by such a standard:

1. The Buddhists in the United States who include 60% of the 185,000 persons of Japanese ancestry, and a considerable portion of the Chinese-Americans. According to Hastings' Encyclopaedia of Religion and Ethics, at p. 183, Buddhism is "radically adverse to the idea of a Supreme Being, of a God, in the Western sense of the word." The Chinese who are Confucian or Taoist are also excluded.

2. Most of the Hindus are affected. The Information Please Almanac for 1954, p. 485, states there are approximately 10,000 Hindus in North America. In

Hastings, *supra*, at p. 184. Hindu literature is quoted to show an important school of that faith denied the existence of God.

3. The Unitarian-Universalists number 151,557. The World Almanac, 1963, p. 706.

4. One group of the Quakers (Appellant's faith) are not members of the National Council of Churches because they do not believe in the Trinity of Divinity.

And before denying a registrant one of the conscientious objector classifications on the assumption that he recognizes no duties "superior to those arising from any human relation" it would have to be established that man is merely human. That has not been established. Congress can create laws but can't create men. man has already been created both human and divine. (Phil. 2:12-13).

Finally, the courts have already stricken down laws of administrative action which attempted to require belief in a Divine Being as a test for religious exemption (*Washington Ethical Society* v. *District of Columbia*, 249 F.2d 127).

As a conclusion to this portion of our argument:

The Supreme Being addition to our 1948 draft law reminds one of the problems the British faced some years ago. Some attention to it may be helpful.

". . . In The Law As Literature, Louis Blum-Cooper, 1961, The Bodley Head, London, the author reports the decision of Lord Sumner, J. A. Hamilton (1859-1934), in *Bowman* v. *Secular Society*. The author relates that it was a case concerning "the validity of a bequest to a society whose main object was to propagate anti-Christian doctrines.

Sumner, delving deep into the history of the criminal offense of blasphemy, gave the quietus to the supposed doctrine that Christianity was a part of the law of England. Blasphemy, he said, was, in the absence of scurrility or indecency calculated to shake the fabric of society, not a criminal offense." [295]

As quoted by the author the Judge said:

"When Lilburne was on his trial in 1649 he complained that he was not allowed counsel and appealed to the judges 'to do as they would be done by.' 'You say well', replied Lord Keble. 'The law of God is the law of England.' But all the same, Lilburne had to do the best he could for himself. A passage from Lord Coke may also be quoted. Brooke, J., had once observed casually (Y. B. 12 Hen. 8, fo. 4) that a pagan could not have or maintain any action, and Lord Coke in Calvin's Case, founding himself on this and on St. Paul's Second Epistle to the Corinthians (Ch. 6, V. 15), stated that infidels are perpetui inimici, and 'a perpetual enemy cannot maintain any action or get anything within the realm'. Of this Willes, C. J., in *Omichund* v. *Barker* observes: 'Even the devils themselves, whose subjects he (Lord Coke) says the heathens are, cannot have worse principles; and beside the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits.' Evidently in this interval the spirit of the law had passed from the Middle Ages to modern times. So far it seems to me that the law of the Church, the Holy Scriptures, and the law of God are merely prayed in aid of the general system or to give respectability to propositions for which no authority in point could be found." [299]

Near the conclusion of his opinion Lord Sumner said:

"My Lords, with all respect for the great names of the lawyers who have used it, the phrase 'Christianity is part of the law of England' is really not law: it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: 'no man can be expected to be faithful to the authority of man, who revolts against the Government of God.' One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best, C. J., once said in *Bird* v. *Holbrook* (a case of injury by setting a spring-gun): 'There is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. 'Thou shalt not steal' is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part. 'Thou shalt love thy neighbor as thyself' is not part of our law at all. Christianity has tolerated chattel slavery: not so the present law of England." [306-307]

By the above argument we do not say, for we need not, that this is not a "Christian Nation". It is to say that Christianity is not a part of the law of the United States just as it is not part of the law of England. On this point also see our argument made on page 34 hereinabove where in we quoted George Washington, writing to the Tripoli government as President of the United States.

(3) Conscience is under constitutional protection.

A Cornell law professor, H. A. Freeman, writing for the Ohio State Law Journal, after reminding us that the first amendment to the Constitution states that "Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise thereof" goes on to argue, "Since by definition 'conscience' is the religious or inner guide determining what is morally right and wrong, the issue is immediately raised whether 'conscience' is a first amendment right, the free exercise of which cannot be prohibited. We all admit that any constitutional right, *e. g.*, free speech, is relative and can be regulated.[50] But regulation is vastly different from prohibition. In other fields regulation has been stricken down when so extensive as to amount to prohibition. To grant the right of regulation does not deny that the source of the regulated right is the Constitution and not the legislature."[51]

He continues: "Let us look to the history of the first amendment and the Supreme Court decisions respecting the right of conscientious objection to determine whether the right is constitutionally guaranteed. I have heretofore recorded my belief, based on as extensive historical research and as sound jurisprudence as I can exercise, that the right is constitutional and within the first amendment. This conclusion is based on a careful examination of the pre-Constitution history, the constitutional debates and drafts, the resolutions of ratification and the state constitutions. All of these show that 'free exercise thereof' was intended to embody freedom of conscience."[52]

"The Supreme Court record is quite inconclusive on this matter, though I believe that correctly understood it will eventually define the right as constitutional. The Court held in United States v. MacIntosh[53] and stated by

---

50. Konvitz, Fundamental Liberties of a Free People, 209-16, 275-341 (1957).

51. See Note 36, *supra*.

52. See Freeman, A Remonstrance for Conscience, 106 U. of Pa. L. Rev. 806, 808-13, n. 3-32 (1958).

53. 283 U.S. 605 (1931).

way of dictum in Hamilton v. Board of Regents[54] that exemption from military service for conscientious objectors was a matter of legislative grace. But both cases involved what the Court deemed a 'privilege,' the opportunity for an alien to become a citizen (MacIntosh) or the chance to attend a tuition-free university (Hamilton). I have elsewhere shown why I believe that any 'privilege' argument as to civil liberties is unsound.[55]

"Furthermore, the Hamilton case was distinguished in the second flag salute case[56] as not applicable to compulsory action, *e. g.* the Draft. The MacIntosh case was overruled in the Girourard case[57] in language that made the minority opinion in the MacIntosh case express the present view of the Supreme Court. This makes the reasoning of the minority in the MacIntosh case take on new significance, and it underlines afresh the remark of both the majority and minority in that case, that Congress had meticulously respected conscience and accommodated military requirements to it as a practical application of our constitutional tradition of religious freedom. The minority's argument was that, since the immigrant (privilege) and the public officer's (citizen's right) oaths were the same, a constitutional issue was presented. There is a threefold result: (1) conscience is clearly protected by the first amendment, (2) duties to God are superior to those owed to the State, and (3) a religious person may constitutionally fulfill his beliefs through acts."

---

54. 293 U.S. 245 (1934).

55. Freeman, Civil Liberties and You, 10 Syracuse L. Rev. 1 (1958).

56. *Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

57. *Girourard v. United States*, 328 U.S. 61 (1946). See also *Schneiderman v. United States*, 320 U.S. 118 (1943).

He then points out that although the lower courts have consistently followed the dictum that conscientious objection is a matter of legislative grace[58] and at least one conscientious objector writer has agreed,[59] he believes this is unsound, particularly in the light of other Supreme Court recognitions of conscience and the right to act in reliance thereon.[60] He concludes: "It would appear that the Supreme Court will not squarely face the full problem of conscience until it determines whether conscientious objection is protected as a constitutional right under the first amendment."

At this point we discuss the Meaning of the First Amendment—the Relation of Conscience to the "Establishment of Religion" and "Free Exercise" Clauses.

All concede there must be a "wall of separation between Church and State." An unresolved issue in this field is presented by the conscientious objector statutes and cases. The present statute recognizes an objector's immunity to military service only if his position is taken because of religious training and belief. Religious belief is then defined as

---

58. *George* v. *United States*, 196 F.2d 445 (9th Cir. 1952), cert. denied 344 U.S. 843 (1952); *United States* v. *Kime*, 188 F.2d 677 (7th Cir. 1951), cert. denied 342 U.S. 823 (1952); *Richter* v. *United States*, 181 F.2d 591 (9th Cir. 1950) cert. denied 340 U.S. 892 (1950); *Michener* v. *United States*, 184 F.2d 712 (10th Cir. 1950).

59. Cornell, The Conscientious Objector and the Law (1943); Cornell, Exemption from the Draft, *supra*, note 44.

60. *Girouard* v. *United States*, 328 U.S. 61, 68 (1946); *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945); *Schneiderman* v. *United States*, 320 U.S. 118, 135 (1943); *Davis* v. *Beason*, 133 U.S. 333, 342 (1890); *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878); *Everson* v. *Board of Educ.*, 330 U.S. 1, 35-38 (1947) (dissent). Cf. Frankfurter, J., in *United States* v. *Nugent*, 346 U.S. 1, 12-13 (1953); *Board of Educ.* v. *Barnette*, 319 U.S. 624, 646 (1943).

belief in "a Supreme Being." As we know the act provides that the administative agency, initially the local boards, try the religious sincerity of a person. Professor Freeman asserts "I have been told again and again by a draft board or court that no Catholic or no Jew, or no Buddhist can be a sincere conscientious objector."

The Bible is literally sprinkled with recognitions that "only God knoweth the secrets of the heart" and the Supreme Court has frequently warned that you cannot try sincerity without treating doctrinal verity, and that heresy trials are contrary to the American system.[61] It is respectfully submitted, however, that the Selective Service Law by testing a person's religious sincerity within these terms is undermining the basic concept of the Separation of Church and State, the non-establishment of a state religion, and the theory against heresy trials.

The concept of a "Divine or Supreme Being" is distinctly a Judeo-Christian concept. Over three-fourths of the religious people of the world have no such stereotyped belief. Islam does not define God in terms of a "Being"; Buddhism takes its stand in favor of a great First Cause but not necessarily a "Being"; Hinduism has physical "manifestations" of God without confining God to a "Being," and so the catalogue could continue.[62] Even some Christians believe in the Divinity of Being and Becoming rather than in a physical Being.

By using the "Supreme Being" test, the Selective Service Law clearly establishes a "state religion" and religious belief. Many sincere conscientious objectors have been refused exemption because they could not come under this definition of religion, the earlier attempt to define

61. Jeremiah 17:10, Psalms 44:21. See note 4, *supra*.

62. See Burtt, *supra*, note 30.

the protection broadly enough to cover all religions having been rejected in the 1948 Selective Service Act and cases thereunder.[63] Some believe that this narrow interpretation is merely a reflection of earlier decisions of the Supreme Court stating that we are a "Christian nation."[64] If those cases were intended to refer to more than our general cultural patterns, and meant to establish that only the Christian religion would be protected, they are clearly wrong.[65]

Professor Freeman continues: "It is my wish that we abandon any official definition of religion, and cease testing religious sincerity and verity by local boards: I should like for us to consider the person who arrives at his position through philosophy and the intellect as worthy of as much respect as one whose position is 'religious.' I might even dare to hope that some day America will be true enough to its great ideal to give up compulsory draft laws and allow complete freedom of religious and intellectual belief."

---

63. The 1940 Selective Service Act merely required religious training and belief. It did not require belief in a Supreme Being. In *United States* v. *Kauten*, 133 F.2d 703 (2d Cir. 1943), the Second Circuit rejected the restrictive interpretation urged by Selective Service. Cf. *Berman* v. *United States*, 156 F.2d 377 (9th Cir. 1946), cert. denied 329 U.S. 795 (1946), and Judge Denman's dissent therein.

The 1948 Act adopted the Selective Service language (Supreme Being). Typical recent cases are: *Clark* v. *United States*, 236 F.2d 12 (9th Cir. 1956), cert. denied 352 U.S. 882 (1956); *Davidson* v. *United States*, 248 F.2d 609 (9th Cir. 1954), cert. denied 350 U.S. 867 (1955).

64. *E. g.*, *Mormon Church* v. *United States*, 136 U.S. 1 (1890); *Davis* v. *Beason*, 133 U.S. 333 (1890); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

65. Any religious "test oath" is clearly prohibited by the Constitution. U.S. Const., art. VI, cl. 3; *Girouard* v. *United States*, 328 U.S. 61, 68 (1946).

He goes on to point out that conscientious objectors also pose a question with regard to the "free exercise" clause of the first amendment which the Supreme Court has not yet faced. Beginning with the Court's attempt to prevent polygamous practices while protecting religious belief and continuing into some of the Jehovah's Witness cases, the Supreme Court has stated that religious belief is absolute but that action taken pursuant to religious belief is not.[66] It is to be noted that in none of these cases, except the polygamy type, has the rule in fact prevented the religious act. It is Freeman's opinion that though it is proper to distinguish between beliefs as absolute and acts as non-absolute, it is improper to thereupon conclude that religious acts can be prohibited or that making them a crime prevents the assertion of religious liberty as a defense. The Reynolds case should be disavowed in this implication.[67]

Freeman, in his Ohio State Law Journal article, *supra*, says that conscience must continue to challenge the Supreme Court to protect First Amendment Liberties against federal action although the protection which the Supreme Court has given religion against state action "[i]s rather magnificent." He states, however, "It will come as a shock to many that not once in its 175 year history has the Su-

---

66. See note 6, *supra*.

67. *Reynolds v. United States*, 98 U.S. 145 (1878). See pp. 33-56 of petition for certiorari to U.S. Supreme Court in *Warren v. United States*, 333 U.S. 947 (1950) (father convicted over defense of conscience, of counselling son not to register with Selective Service); Freeman, *Civil Liberties and War*, *supra*, note 55; Freeman, *A Remonstrance for Conscience*, *supra*, note 52. See supporting expressions in *American Communications Assn. v. Douds*, 339 U.S. 382, 399 (1950); *United States v. Ballard*, 322 U.S. 78, 86 (1944); *Near v. Minnesota*, 283 U.S. 697, 720-21 (1931).

preme Court clearly protected religious freedom (or any other of the first amendment freedoms) against federal legislation and some judges speak for almost total deference to congressional will."

He points out there are a long series of cases which have asked the Supreme Court to protect religious conscience, and to face the important issues outlined above. The record to date, however, is an unbroken one of refusal to hear these cases.

In a whole series of cases conscientious objectors have tried to challenge criminal laws on the ground that they violate religious freedom.[68] They seem to be met by the

---

68. *Gara v. United States*, 178 F 2d 38 (6th Cir. 1949), aff'd by an equally divided Court, 340 U.S. 857 (1950) (dean of students encouraging student to obey his conscience in not registering); *Clark v. United States*, 236 F 2d 13 (9th Cir. 1956); cert. denied 352 U.S. 882 (1956) (an agnostic challenging the Supreme Being clause); *Davidson v. United States*, 218 F 2d 609 (9th Cir. 1954), remanded 349 U.S. 918 (1955), reaff'd 225 F 2d 836 (1955), cert. denied 350 U.S. 887 (1956) (a Socialist, "economic basis" objector questioning the Supreme Being clause); *Palmer v. United States*, 223 F 2d 893 (3rd Cir. 1955), cert. denied 350 U.S. 873 (1955) (refusal to exhaust administrative remedies for conscience reasons); *George v. United States*, 196 F 2d 445 (9th Cir. 1952), cert. denied 344 U.S. 843 (1952) (refusal to report for induction and failure to file classification questionnaire on grounds of conscience); *United States v. Kime*, 188 F 2d 677 (7th Cir. 1951), cert. denied 342 U.S. 923 (1952) (failure to carry registration card for conscience reasons); *Richter v. United States*, 181 F 2d 591 (9th Cir. 1950), cert. denied 340 U.S. 892 (1950) (refusal to register on ground draft act violated first amendment); *Cannon v. United States*, 181 F 2d 354 (9th Cir. 1950) cert. denied 340 U.S. 892 (1950) (refusal to register on ground draft act violated first amendment); *Frantz v. United States*, 180 F 2d 711 (7th Cir. 1950), cert. denied 339 U.S. 963 (1950) (refusal of Quakers to complete Selective Service forms, though notifying draft boards, as military action being contrary to conscience); *Warren v. United States*, 177 F 2d 596 (10th Cir.

answer that once an act is defined as criminal the right to engage in that act is not a part of the right of religious freedom. By refusing to hear these cases the Supreme Court has appeared to sanction this reasoning. Sooner or later the Court is going to have to face this problem. To any truly religious person it is not enough to be allowed to believe what he will. All great religion requires him to act on his belief. The first amendment does not define its protection in terms of belief but in terms of "exercise" or action. The issue goes beyond the conscientious objector for it affects the very theory of religious obligation and religious liberty.

We conclude therefore that the (1) total exemption to ministers, (2) the requirement of a belief in a Supreme Being and (3) the protection of conscience omitted from the act all offend the First Amendment guaranties.

C. The Act offends the Thirteenth Amendment.

The gist of our argument here is that the Thirteenth Amendment is violated by a draft law *absent a declared emergency* or war.

There is no doubt we live in a troubled time. But hasn't this been said throughout all history, by many administrators and legislators, and with equal basis?

The Second Circuit, in upholding conscription pointed out that Congress obviously considered it was "... needed during a great national emergency ..." *Brooks* v. *United*

(1949), cert. denied 338 U.S. 947 (1950) (father, a religious objector, counselling son not to register for draft, son registered, father convicted of counselling draft violation, over defense of conscience); *United States* v. *Atherton*, 176 F.2d 835 (9th Cir. 1949), cert. denied 338 U.S. 938 (1950) (refusing to remain in C.P.S. camp).

States, 1945, 147 F.2d 134, 134-135. Note that Brooks arose and was decided during wartime. It is also seen that other cases, such as *United States* v. *Hoepker*, 7 Cir., 1955, 223 F.2d 921, in rejecting the constitutional attack therein made refer to "The war power, which is reserved to Congress, encompasses authority to conscript manpower to defend the nation during a national emergency." (923) In the application of the Seventh Circuit's reasoning, with respect to "national emergency" it should be borne in mind that the orders to report for induction (in Hoepker and the other cases in the consolidated appeal) were issued while the Korean emergency was still present.

See the argument *supra* on conscription of labor.

D Peace time conscription was not required by a clear and present danger and cannot be so justified at present.

It is our position that freedom of religion, in fact all the freedoms of the First Amendment are to yield to an Act of Congress only when and to the extent that the national interest is threatened by a clear and present danger.

This of course is no concession that any Act of Congress meets this test merely if it is labelled as the chosen antidote to a danger. This would enable Congress to throw an iron wall of protection around any statute. The courts with their powers of construction are to judge if the constitution is violated. In judging, the courts may take judicial knowledge of many facts of life as well as the very wording of the Act in question. The Act in question may be compared and contrasted with similar Acts and the conclusions drawn from such methods of comparison are weighty.

Pursuing our argument and applying this last-named method of scrutiny we will first compare the various draft Acts.

(1) There was not even a declared emergency in the present Act.

The 1917 Act was a *war* measure. Moreover, as we have already pointed out (by quoting the first paragraph of Arver) it was labelled "temporary" by Congress itself.

The 1940 Act was explicitly labelled an *emergency* measure:

> "The Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States." 50 U.S.C.A. Appendix § 301(a).

We have shown elsewhere that the same was true of the 1795 and 1863 laws.

Our current law, the Universal Military *Training* and Service Act, Section 1 (b) concentrated on training and declared no emergency:

> "(b) The Congress hereby declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation."

It is evident that in the current law Congress did not even attempt to make it an emergency measure, nor to declare "it is *imperative* to increase" the personnel of the armed forces, the expression it had chosen in 1940.

(2) A clear and present danger must be shown to uphold the Act.

(a) The doctrine of clear and present danger:

Whenever the Supreme Court has found it necessary to limit the fundamental freedoms of the Bill of Rights,

it has used what has been referred to as the clear and present danger doctrine. This doctrine has been applied not only to the freedom of speech and press cases, but also in the freedom of religion cases.

This doctrine is well expressed in *Bridges* v. *California*, 314 U.S. 252:

> "What finally emerges from the clear and present danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished. . . . for the First Amendment does not speak equivocally." [263]

The Supreme Court has used this doctrine in declaring laws unconstitutional which would be apparently valid, such as limiting the distribution of handbills in order to keep the streets clean (*Cantwell* v. *Connecticut*, 310 U.S. 296, 1940); the requirement that children should salute the flag when attending school (*West Virginia* v. *Barnette*, 319 U.S. 624, 1943); an attempt to prevent religious persons from speaking against war and the draft (*Taylor* v. *Mississippi*, 319 U.S. 583).

The doctrine is applicable even though, as in the case at bar, the appellant's belief led him to actions that are peculiar as judged by majority standards:

> "Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and however novel those views may be." (Dissent—Jones v. City of Opelika, 316 U.S. 584, 1942). One writer on the subject has presented the matter this way:

> "It is necessary for the court to presume legislation unconstitutional not only when it is discriminatory on its face (Korematsu v. U. S., 323 U.S. 214, 216)

and when it may appear to the court that the primary motive was to discriminate against a particular minority (Example: Statutes aimed at parochial schools. Pierce v. Society of Sisters, 262 U.S. 390) but also where legislation is apparently enacted in good faith but necessarily results in oppression of a minority because the group does not conduct itself in the customary manner. A school flag salute rule may have been well intended but it was held to be a violation of a group's religious beliefs because it represented to them the bowing before a graven image.

"Requiring a peddler's license would seem proper on its face but such a law was declared invalid because of placing a discriminatory burden on the religious practices of Jehovah's Witnesses. (Murdock v. Pennsylvania, 319 U.S. 105, 109, 1943)." Sources and Limits of Religious Freedom—Summers, 41 Illinois Law Review 53,67.

The application of this doctrine by the Supreme Court has been analyzed by another authority. (Robert Cushman, Essays on Political Theory, Cornell Univ. Press, 1948)

He first shows the tests the Supreme Court uses and the illustrative cases:

"First in five important cases decided since 1940, the Court has applied the clear and present danger test, as it did in the Schenck case to determine whether particular speeches or publications actually constituted forbidden acts or conduct."

(In this group he includes Cantwell v. Connecticut, 310 U.S. 296, a Jehovah's Witness case, where phonograph records had caused threats of violence, yet were not considered to create a clear and present danger of breaches of the peace. Bridges v. California, 314 U.S. 252; Pennekamp v. Florida, 328 U.S. 331; Craig v. Harney, 331 U.S. 367, in all

of which published attacks upon judges were found not to show such clear and present danger of obstruction to justice as to constitute contempts; and Hartzell v. U. S., 322 U.S. 680, where a scurrilous attack broadly distributed, favoring Germany, attacking the President and urging an internal racial war, was held not to constitute violation of the espionage act.]

"Second, cases where The Court applied the clear and present danger test as a "rule of reason" in striking down convictions and protecting act or speech under the first Amendment without holding the statute invalid.

[Here are discussed Taylor v. Mississippi, 319 U.S. 583, urging opposition to the war, the draft and flag saluting and Thomas v. Collins, 323 U.S. 516, non-registration before giving a speech.]

"Third, beginning in 1940, the Court in several cases has used clear and present danger as a test of the validity of statutes themselves, rather than a test of the validity of their application to concrete situations. In each of these cases the Court held the questioned statute bad.

[The most important cases are Thornhill v. Alabama, 310 U.S. 88 and Carlson v. California, 310 U.S. 106, anti-picketing statutes and the second flag salute case, W. Va. v. Barnette, 319 U.S. 624.]"

He next shows the steps by which this doctrine has developed:

"The steps by which this has come about may be traced as follows. First, by the nineteen-twenties the American judicial mind, and especially that of the Supreme Court had been fully won over to the doctrine that legislative exercises of the police power must be presumed by the courts to be vali', and should

be upheld as long as the question of their validity is reasonably debatable.

"Second, the mounting volume of legislation aimed at the suppression of various kinds of minority opinion and its expression soon placed the liberal-minded judge in a most uncomfortable dilemma.

"Third, the Supreme Court has recently extricated itself from this dilemma by a bold stroke. It has announced that the four great guarantees of civil liberty in the First Amendment, freedom of speech, press, religion, and assembly, are more important to our democracy than are other parts of the Constitution. They occupy a preferred place in our scheme of constitutional values. Therefore a statute passed in the exercise of the police power, or any other power which on its face appears to restrict any one of these four great civil liberties will not be presumed to be constitutional. On the contrary, it will be presumed to be unconstitutional, and the burden of proof will rest squarely upon the shoulders of those who defend it.

"Fourth, in order to assume successfully the burden of proof imposed by this presumption of invalidity the clear and present danger to the security or welfare of the state or nation demands the restrictions which the legislature has placed upon any of the four freedoms protected by the First Amendment."

Professor Harrop A. Freeman, of Cornell (heretofore referred to) adds—

"[t]hat it is now recognized that the government carries the burden of proof on 'clear and present danger' and like facts showing the validity of a law restricting religious liberty, as the United States Court of Appeals of the District of Columbia (Busey v. D. C., 138 F.2d 592) felt required to point out after remand from the Supreme Court (319 U.S. 579)

"We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are valid."

In the light of the above trends and principles which resulted in this Court finding no "clear and present danger" in refusing to salute the flag (*W. Virginia v. Barnette, supra*), in a Jehovah's Witness playing an anti-Catholic record in streets where 90% of the people were Catholic and where threats were made by residents that they would beat up the Jehovah's Witness (*Cantwell v. Connecticut, supra*), in a Jehovah's Witness condemning the war and draft and distributing literature to this effect to parents of draftees during a war (*Taylor v. Mississippi, supra*), how can there be a "clear and present danger" in the present case?

(b) Facts bearing on the application of the doctrine. We are mindful of international conditions. It is conceded that possibly never has there been a period in history when threat of war was more in the minds of men. Until the current nuclear era our concession could be considered an admission that this ever-present spectre of war was the equivalent in 1948 (and now) of either a state of war or of an explicitly declared emergency. Therefore, it could be argued that it would follow that the right of a government to protect the nation encompassed the right to make all necessary constitutionally-authorized preparations for conflict. This we do not contest.

We assert, however, that the clear facts of life of this nuclear age remove conscription from the list of "necessary preparations." It is no longer deemed necessary to wall cities; no moats are being dug around the walls that already exist.

It is common knowledge that in this era the passage of a very few years makes much of the offensive and defensive armament obsolete. In our special area of concern it is to be noted that nuclear and "machine" warfare depends on a force of highly trained operators. For some years past the average monthly draft calls have been mere tokens and these men have not been trained for modern technological warfare or retained for the period necessary for this. Why? Because the need for mass manpower for military purposes is clearly a thing of the past. Then why do we have conscription? Is it like the human appendix? Many observers and some countries like Great Britain seem to think so. Britain no longer has conscription. To speculate on this matter or even to marshal opinion on it would not in themselves serve to convince for the subject does not permit exact proof. Nevertheless certain facts are commonly known: the changing technology of this nuclear age; that only one service, the army, has been using draftees; the country's population explosion with the projected figures for males becoming 18 soon accelerating, due to the great post WWII baby crop. Again, we ask where is the clear and present need for the draft?

Even if this argument were to be brushed aside and the court assume (1) that peace-time conscription is a necessary part of our defense preparation or, (2) have the conviction that we have not shown yet a constitutional basis for our attack (and thus that our argument is one more properly directed to Congress) so that our initial argument must be rejected, we believe the court should

be convinced it is unnecessary to reject our attack on the Act as *construed and applied to appellant*. Appellant and all of like pacifist persuasion are but a miniscule portion of the population and to respect their religious view does not diminish the man-power directly or indirectly or otherwise damage the national effort.

In WWII the total number of individuals asserting any kind of religious objection to conscription totalled 18,000 out of 32,000,000 draft registrants. Twelve thousand objectors were acknowledged to be such by the Selective Service System and were assigned to Civilian Public Service Camps and related civilian work. Six thousand objectors either couldn't convince the administrative agency of their claims to a conscientious objector's classification or (in a relatively few instances) "walked-out" of the C.P.S. camps. These 6,000 went to federal prisons. This above data is from Volume 11, Conscientious Objection, published by the Selective Service System, 1950.

Our argument that the minute size of the problem of conscientious objection is a weighty consideration is an argument used by this Court, on February 18, 1963, in the denationalization case of *Kennedy* v. *Mendoza-Martinez*, 83 S. Ct. 554, 576. In its conclusion the Court observed: "Thus our holding today does not frustrate the effective handling of the problem of draft evaders who leave the United States" and in a footnote to this comment it showed "42. Moreover, the problem is relatively extremely small." [figures given]

CONCLUSION

For the reasons given the judgment should be reversed.

Respectfully,

J. B. TIETZ,
410 Douglas Building,
Los Angeles 12, California,
Attorney for Petitioner.

September 9, 1963.